Petition

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HOMETTE CORPORATION,
Petitioner,

v

HONORABLE JAMES HARVEY
U.S. DISTRICT JUDGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE FAILURE OF THE FEDERAL DISTRICT COURT JUDGE TO EVEN CONSIDER THE FINDINGS OF THE MICHIGAN CIRCUIT COURT AND COURT OF APPEALS ON THE ISSUE OF *FORUM NON CONVENIENS* CONSTITUTES AN ABUSE OF DISTRETION?

II.

WHETHER THE HONORABLE JAMES HARVEY MISCONSTRUED THE INTENDED MEANING OF 28 USC 1404(A) IN CONSIDERING AND DETERMINING THE QUESTIONS OF THE CONVENIENCE OF PARTIES AND WITNESSES, AND THE INTERESTS OF JUSTICE?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

In Court of Appeals:	Homette Corporation Honorable James Harvey
In U.S. District Court:	Laura Marie Briggs, as Administratrix of the Estate of Roger Lee Briggs
	Champion International Corporation
	Homette Corporation

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HOMETTE CORPORATION,
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v

HONORABLE JAMES HARVEY
U.S. DISTRICT JUDGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Homette Corporation, petitioner, respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this cause on May 13, 1981.

OPINIONS BELOW

Homette Corporation v *Honorable James Harvey*, United States Court of Appeals for the Sixth Circuit, No. 81-1167, Order Denying Petition for Writ of Mandamus issued on May 13, 1981. (see Appendix E)

Laura Marie Briggs, as Administratrix of the Estate of Roger Lee Briggs, Deceased v *Champion International Corporation and Homette Corporation*, United States District Court, Eastern District of Michigan, Northern Division, Memorandum Opinion and Order Denying Defendants' Motion for Change of Venue issued February 23, 1981. (See Appendix A)

JURISDICTION

This case is brought to the United States Supreme Court following an order of the United States Court of Appeals for the Sixth Circuit, dated May 13, 1981, denying Defendant's Petition for Writ of Mandamus. Said order left standing the decision of the District Court, Eastern District of Michigan, Northern Division, dated February 23, 1981, denying Defendant's Motion for Change of Venue.

The jurisdiction of this Honorable Court is invoked pursuant to 28 USC 1254(1).

This case came to the United States Court of Appeals pursuant to 28 USC 1751. Plaintiff brought her suit in Federal District Court under 28 USC 1332.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 USC 1404(a):

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 USC 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the court of such State, Territory or Possession from which they are taken.

U.S. Constitution, Article IV, Section 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

STATEMENT OF THE CASE

Roger Lee Briggs was fatally injured on the premises of HOMETTE CORPORATION in New Ulm, Minnesota, on October 18, 1977. HOMETTE CORPORATION, herein referred to as Defendant, is an Indiana corporation and is not licensed to do business in the State of Michigan

Laura Marie Briggs, Administratrix of decedent's estate, and herein referred to as Plaintiff, filed a complaint on August 29, 1978 in Midland County Circuit Court in the State of Michigan. Plaintiff's Complaint basically alleged that servants or employees of the HOMETTE CORPORATION plant in New Ulm, Minnesota, resulting in the death of Roger Lee Briggs. Plaintiff also alleged that co-Defendant, CHAMPION INTERNATIONAL, improperly loaded certain materials which fell during unloading, causing the death of Plaintiff's decedent.

The issue of *forum non conveniens* was first addressed on January 29, 1980, when the Midland County Circuit Court for the State of Michigan determined that the proper forum for Plaintiff's cause of action was New Ulm, Minnesota. (Appendix B) The Court had reserved its opinion until it had reviewed extensive discovery which had taken place in Minnesota. The trial court granted this dismissal without prejudice to plaintiff's right to refile her action in the proper place, New Ulm, Minnesota. (Appendix C)

Rather than comply with the state court's direction, the Plaintiff filed an action in the United States District Court for the Eastern District of Michigan, Northern Division. Defendant responded by filing a motion for change of venue under 28 USC 1404. During this period,

Plaintiff was also seeking review of the Midland Circuit Court's decision in the Michigan Court of Appeals.

On October 9, 1981, the Michigan Court of Appeals issued a per curiam, unpublished opinion, affirming the order of the trial court dismissing Plaintiff's action. (Appendix D)

On February 23, 1981, the Honorable James Harvey, District Judge for the Eastern District of Michigan, issued a Memorandum Opinion and Order, denying Defendant's Motion for Change of Venue. (Appendix A) In said Opinion and Order, there was no mention whatsoever made of the previous findings by the Midland County Circuit Court and the Court of Appeals for the State of Michigan.

Defendant filed a Petition for Writ of Mandamus, under 28 USC 1651, with the United States Court of Appeals for the Sixth Circuit, on March 20, 1981. The United States Court of Appeals denied Defendant's request in an order entered May 13, 1981. (Appendix E)

From said decisions, Defendant brings this petition for certiorari in the United States Supreme Court.

ARGUMENT

I.

THE FAILURE OF THE FEDERAL DISTRICT COURT JUDGE TO EVEN CONSIDER THE FINDINGS OF THE MICHIGAN CIRCUIT COURT AND THE COURT OF APPEALS ON THE ISSUE OF FORUM NON CONVENIENS CONSTITUTES AN ABUSE OF DISCRETION.

Under 28 USC 1404(a), a District Court may transfer any civil action to any other district or division where it might have been brought. In considering motions under

this section, a District Court judge must balance the convenience of parties and witnesses, and the interests of justice. The Supreme Court has noted that the Congressional intent behind § 1404(a) was to reduce waste of time, energy and money, and protect against the inconvenience of duplicatory litigation. *Continental* v *the FBL*, 364 U.S. 19, 27; 4 L.Ed.2d 1540; 80 S.Ct. 1470 (1960).

In the present case, the Honorable James Harvey has applied § 1404(a) in such a manner that the waste that Congress sought to eliminate has instead been exacerbated. The resulting judicial inefficiency and injustice to the Defendant raise an important question of federal law which should be decided by this Court.

Plaintiff originally brought suit in the Midland County Circuit Court in the State of Michigan. Defendant moved for accelerated judgment on the ground of *forum non conveniens*, as interpreted by the Michigan Supreme Court in *Cray* v *General Motors Corp.*, 389 Mich 382; 207 NW2d 393 (1973). The criteria used by Michigan courts in deciding *forum non conveniens* issues, is substantially the same as that laid out in § 1404(a):

> "In summary, this Court finds that the doctrine of *forum non conveniens* is applicable in Michigan and that it is within the discretion of the trial judge to decline jurisdiction in such cases as the convenience of the parties and the ends of justice dictate." *Cray, supra*, at p. 396.

After extensive discovery and a complete hearing on this matter, Midland County Circuit Judge DeWitt dismissed Plaintiff's action without prejudice.

Plaintiff next filed an appeal with the Michigan Court of Appeals. Again, after substantial amounts of time and

money were spent, decision was rendered against the Plaintiff.

When the Plaintiff proceeded to bring the present action in the United States District Court for the Eastern District of Michigan, Northern Division, the Defendant moved for transfer under § 1404(a). This motion was denied by the Honorable James Harvey. Defendant submits that the failure of Judge Harvey to even consider the previous extensive litigation in the state courts constitutes an abuse of discretion.

The Defendant is not unmindful, of course, of the Supreme Court's decision in *Parsons* v *Chesapeake & Ohio Railway*, 375 U.S. 71; 11 L.Ed.2d 1227; 84 S.Ct. 185 (1963). Faced with somewhat similar, but not identical facts, the Court overruled the U.S. Court of Appeals, 7th Circuit, and held that a state court's dismissal of a suit on the ground of *forum non conveniens* does not divest a Federal District Court of discretionary power to rule on 1404(a) motion for transfer in a like action between the parties.

The decision in *Parsons* should not be viewed as controlling the instant case. While the Defendant readily admits that he disagrees with this holding, the question now before the Court is simply whether the failure of Judge Harvey to even consider the proceedings in the state courts amounts to an abuse of discretion.

The Supreme Court has stated that there is no hard and fast rule by which an abuse of discretion may be determined, but that this matter turns on the circumstances of the particular case. *Langnes* v *Green*, 282 U.S. 531; 75 L.Ed. 520; 51 S.Ct. 243 (1930). Exercise of discretion that is not legally sound, or does not involve an honest effort by the court to do what is equitable under the circumstances and law, has been held to be an

abuse of discretion. *Langnes, supra*. Moreover, numerous cases have struck down arbitrary and unreasonable decisions as an abuse of discretion. *People* v *Pfanschmidt*, 262 Ill 411; 104 NE 804 (1914); *Teetzel* v *Atkinson*, 292 Mich 592; 291 NW 18 (1940); *McFarlan* v *Fowler Bank City Trust Co.*, 214 Ind 10; 12 NE2d 752 (1938); *Best* v *Yerkes*, 247 Iowa 800; 77 NW2d 23 (1956).

In the present case, Judge Harvey's failure to even consider previous state court proceedings on the identical issue, renders his decision unsound, unreasonable, and arbitrary. The Judge's order, ostensibly directed at the convenience of the parties, ignores the substantial state court record on this matter. Such an omission, aside from showing a lack of respect for the state courts, indicates that the Judge did not consider the prior costly state court litigation as relevant to the overall convenience and interests of justice in choosing a forum for this action. As such, he failed to consider an appropriate factor and abused his discretion.

Moreover, the Defendant submits that the instant case may also be distinguished from *Parsons* on other grounds. First, in *Parsons*, the plaintiff was attempting to bring an FELA suit, and as such, was seeking vindication of a federal right in a federal forum. In the present case, Plaintiff brings a simple tort action grounded in state law. Thus, the need for determination of *forum non conveniens* by a federal court is far less pressing in the instant case. Secondly, the plaintiff in *Parsons*, did not increase the expense of all concerned by embarking upon appeal in the state court system. On the other hand, the Plaintiff in the present case did move up through the state court system. By taking this action, after voluntarily initiating her suit in the Michigan State Courts, the Plaintiff further compounded Defendant's

expenses. In view of this, it is equitable to hold the Plaintiff to her own choice and make her abide by the state court's determination of *forum non conveniens*.

In passing judgment on Defendant's petition, the Court must, of course, consider the backdrop of *res judicata* and full faith and credit (U.S. Const., Art. IV, § 1), against which this case is set. Through 28 USC 1738, Congress has imposed a duty on federal courts to give full faith and credit to the judgment of state courts having proper jurisdiction. *Davis* v *Davis*, 305 U.S. 32, 40; 59 S.Ct. 3; 83 L.Ed. 26 (1938). *Wayside Transp. Co.* v *Marcell's Motor Express, Inc.*, 284 F2d 808 (1960) (1st Circuit).

It has been long-settled that due process does not give parties the right to litigate the same issue twice. *Chicago Life Insurance Co.* v *Cherry*, 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed. 966 (1917). The full faith and credit clause serves to implement the public policy concern "that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v *Iowa State Traveling Men's Association*, 283 U.S. 522, 525; 51 S.Ct. 517, 518; 75 L.Ed. 1244 (1931).

The Plaintiff in the present case would certainly be barred from refiling his action in any state court in Michigan after the rulings of the Circuit Court and the Court of Appeals. Thus, the policy concerns noted by the Court in *Baldwin, supra*, and by Congress in enacting 28 USC 1738, strongly support Defendant's position. Therefore, Judge Harvey's decision, ignoring the previous state court proceedings, should not be allowed to stand, and Defendant's petition for certiorari should be granted. Defendant further prays that this Court,

pursuant to 28 USC 1651 and/or 28 USC 2101(f), order the Honorable James Harvey to stay proceedings before him, pending action on this petition.

II.

THE HONORABLE JAMES HARVEY MISCONSTRUED 28 USC 1404(a) IN CONSIDERING AND DETERMINING QUESTIONS OF THE CONVENIENCE OF PARTIES AND WITNESSES, AND THE INTERESTS OF JUSTICE, RAISED BY DEFENDANT'S MOTION FOR CHANGE OF VENUE.

While the Defendant has submitted that the failure of the District Court to even consider the findings of the state courts is sufficient to constitute an abuse of discretion, the Defendant further draws the Court's attention to facts and circumstances which call for the application of *forum non conveniens*. Indeed, the present case epitomizes the situation in which this doctrine should be applied.

The incident upon which the Plaintiff bases her cause of action took place in New Ulm, Minnesota. It is apparent that the witnesses and evidence in this case are found there. In this regard, it is important to note that none of the eyewitnesses to the incident are agents or employees of any party to this case. While a Minnesota forum would certainly be more convenient for these individuals, it is even more important to recognize that the interests of justice also dictate that this matter be tried in this state. Otherwise, there would be the strong probability that any trier of fact would be forced to make a determination without the assistance of the live testimony of the actual witnesses to the incident. Being private citizens of the State of Minnesota, and being unassociated with any of the parties, there is clearly an absence of the availability of eyewitnesses to this cause in any state other than Minnesota.

It is also apparent from the record of this case that the Plaintiff relies heavily on determinations made by the Minnesota Occupational Safety and Health Administration, and the provisions of the Minnesota Occupational Safety and Health Act, in an effort to establish liability against the Defendant. Upon taking depositions with respect to the issue of jurisdiction in Minnesota, the Plaintiff's attorney repeatedly relied on the ongoing OSHA proceedings in Minnesota, and, in fact, relied on experts who are employees of the Minnesota Occupational Safety and Health Administration. Extensive materials have been accumulated through these proceedings in Minnesota inasmuch as the question of action against the HOMETTE CORPORATION by the Minnesota Occupational Safety and Health Administration has gone through the appeal process and is presently pending in the courts of the State of Minnesota. A trial of the factual issues of the present case, in any state other than Minnesota, would be burdened with the questions of applicability or inapplicability of the extensive Minnesota laws as they control the work place. Further, any interpretations would be scrutinized under the case law of Minnesota. Therefore, Plaintiff's own reliance on the extensive activities of the Minnesota Occupational Safety and Health Administration would make it extremely burdensome to have this case tried in any state other than Minnesota.

RELIEF REQUESTED

For the reasons above set forth, Petitioner respectfully prays this Court issue its Writ of Certiorari in this case to the United States Court of Appeals for the Sixth Circuit, and stay the proceedings before The Honorable James Harvey in United States District Court, Eastern District of Michigan, Northern Division.

Respectfully submitted,

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Dated: August 6, 1981

APPENDIX A

MEMORANDUM OPINION AND ORDER

(United States District Court
Eastern District of Michigan
Northern Division)

(Rec'd. Feb. 24, 1981)

Laura Marie Briggs, as Administratrix of the Estate of Roger Lee Briggs, Deceased, Plaintiff, v Champion International Corporation, and Homette Corporation, Jointly and Severally, Defendant. Civil Action No. 80-10044)

At a session of said court, held in the Federal Building, Bay City, Michigan on the 23rd day of February, 1981.

PRESENT: Honorable James Harvey, United States District Judge.

Plaintiff brings this action for damages for the wrongful death of her husband Roger Lee Briggs. The matter is before the Court as follows:

(1) Defendants' motion for change of venue and/or dismissal;

(2) Plaintiff's motion to compel answers to interrogatories;

(3) Plaintiff's renewed motion to use prior depositions and for determination of sufficiency of defendant Homette Corporation's answers to plaintiff's request for admissions; and

(4) Employers Mutual Casualty Company's motion for leave to intervene as a party plaintiff.

Factual Allegations

In her complaint, plaintiff alleges that in October, 1977, her husband, the decedent, operated a truck which he used to deliver a cargo of floor decking and boxes, loaded on a trailer by, and under the direction of, defendant Champion International Corporation (Champion), from the Gaylord, Michigan plant of defendant Champion to the New Ulm, Minnesota plant of defendant Homette Corporation (Homette).

On October 18, 1977 a forklift operator of defendant Homette lifted the floor decking sheets off the trailer. The sheets fell and struck plaintiff's husband, injuring him and causing his death.

Plaintiff alleges that the decedent was a resident of Michigan; that defendant Champion is a New York corporation with its principal place of business in a state other than Michigan; and that defendant Homette is an Indiana corporation.

Plaintiff sues defendant Champion on theories of negligence, implied warranty, and strict liability relating to the loading of the floor decking on the trailer at its plant in Gaylord, Michigan and to the condition of the pallets of decking sheets on the trailer. Plaintiff sues defendant Homette on various theories of negligence relating to the unloading of the trailer at its plant in New Ulm, Minnesota.

Defendants' Motions for Change of Venue and/or to Dismiss

Both defendants have moved the Court for a change of venue and/or dismissal pursuant to FR Civ P 12(b)(1) and (3) and 28 USC 1404 and 1406.

Defendants contend that since the accident occurred at the defendant Homette's plant in New Ulm, Minnesota and since the witnesses to the accident and the extensive investigative authorities involved are all located in New Ulm, Minnesota, the proper venue for the action should be in Minnesota as Michigan is a *forum non conveniens*.

Plaintiff refutes defendants' assertions by indicating that plaintiff proposes to call witnesses who have knowledge of the loading procedures used at defendant Champion's plant in Michigan and who probably live in Michigan. Plaintiff cannot indicate the names of such witnesses since defendant Champion has failed to answer its interrogatories regarding such witnesses.

The Court has reviewed the arguments of counsel and is compelled to agree with plaintiff. When transfer would be more convenient for one defendant, but less convenient for another defendant, plaintiff's choice of forum has been sustained. *Bonnette* v *California Health & Welfare Agency*, 414 F Supp 212 (ND Cal, 1976).

Even though defendant Champion has adopted defendant Homette's motion for change of venue or dismissal, it is clear that many aspects of plaintiff's complaint relate to the loading of the pallets by defendant Champion's employees in Gaylord, Michigan. It is highly probable that these employees and other witnesses with related knowledge reside in Michigan.

For this reason, the Court concludes that Michigan is not a *forum non conveniens* as to all the parties and defendants' motions for change of venue and/or dismissal are hereby DENIED. Further, defendant Champion is hereby ORDERED to answer plaintiff's complaint within 20 days of receipt of this order.

Plaintiff's Motion to Compel Answers to Interrogatories and to Award Costs

Plaintiff moves the Court to compel defendant Champion to answer its interrogatories filed on February 25, 1980 which defendant Champion has not answered or filed objections to and to award costs to plaintiff for the expense incurred in bringing this motion. Defendant Champion has not responded to plaintiff's motion filed on December 24, 1980. However, plaintiff's motion to compel fails to comply with Local Rule 17(a) in that it does not affirmatively state that opposing counsel's concurrence in the motion was sought and could not be obtained.

For this reason, the Court will DENY plaintiff's motion and ORDERS defendant Champion to file its answers or objections to plaintiff's interrogatories within 30 days of receipt of this order pursuant to the provisions of FR Civ P 33.

Plaintiff's Renewed Motion to Use Depositions and for Determination

Plaintiff has renewed her motion pursuant to FR Civ P 32(a) requesting that transcripts of seven depositions of witnesses on file in the 42nd Circuit Court, County of Midland, State of Michigan, may be read into evidence in the case in this court which involved the same facts, parties, attorneys, opportunities and motives to examine these seven witnesses, but has now been dismissed, so that further expense may be avoided.

Defendant Homette objects to plaintiff's request on the grounds that these witnesses were deposed with respect to the question of jurisdiction of the Midland Circuit Court over the case and for no other purpose. Thus, the depositions could serve no purpose in this action.

Since the depositions have not been submitted, this Court cannot determine whether the content of the depositions involves "the same subject matter" to permit their use in this case under FR Civ P 32(a).

The Court will, therefore, require that plaintiff have these depositions filed with this Court and that defendants file formal objections to their admissibility pursuant to FR Civ P 32(b) within 20 days of receipt of plaintiff's notice of filing depositions with this Court. Plaintiff may file a response to the objections within 10 days after defendant's objections are filed and the Court will then rule on the objections.

Accordingly, defendant's motion for use of depositions is DENIED WITHOUT PREJUDICE in conformity with the requirements set forth above.

Plaintiff also has renewed her motion pursuant to FR Civ P 36(a) requesting the Court to determine the sufficiency of defendant Homette's answers and objections to plaintiff's Second Request for Admissions, numbers 1 through 10.

In response, defendant has requested the Court to defer ruling on the relevancy of the requests for admissions until after the Court has determined the defendant's motion to dismiss.

Having decided the motions to dismiss, the Court determines that plaintiff's request for admissions are relevant and that defendant's answer and objections are insufficient. Accordingly, plaintiff's motion is GRANTED and defendant Homette is ORDERED to file sufficient answers or objections within twenty days of receipt of this order. No costs will be awarded to plaintiff for expenses incurred in bringing this motion.

Motion to Intervene

Employers Mutual Casualty Company has moved the Court for leave to intervene as a "silent" party plaintiff in this action.

Movant asserts that it is the worker's compensation insurance carrier and also the automobile insurer for plaintiff's decedent's employer, St. Louis Freight Lines. As such, movant seeks to have a lien upon any judgment recovered by plaintiff to the extent of any payment made by it to the plaintiff under the Workmen's Compensation Act, MCLA 418.101 et seq, or under the economic portions of the Michigan No-Fault Insurance Act. MCLA 500.3101 et seq.

Plaintiff does not contest movant's right to intervene under the Worker's Compensation Act but does challenge its right to intervene under the Michigan No Fault Insurance Act.

Without addressing the merits of plaintiff's arguments or making a determination as to plaintiff's alternative request that the Court's order of intervention limit movant's reimbursement in certain aspects for the no-fault insurance benefits it has paid, the Court will allow movant to intervene and will defer determination of these issues until after trial of this matter or settlement has been reached if the parties cannot amicably resolve this dispute among themselves.

NOW, THEREFORE, IT IS HEREBY ORDERED that Employers Mutual Casualty Company may join this lawsuit in the followinl manner:

1. Employers Mutual Casualty Company may enter its appearance in this cause, by its attorneys, who may designate themselves "of

counsel" for the plaintiff, but shall not be named in the action of this case, as intervener; nor shall Employers Mutual Casualty and/or its attorneys or anyone in its behalf, actively participate in the trial of this litigation or be seated at the plaintiff's table during the trial; nor shall any party at any time in the presence of the jury, make reference to the payment of compensation benefits or no-fault insurance benefits by Employers Mutual Casualty Company, or to its interest in this lawsuit, unless the Court shall have previously ruled that such reference, under the circumstances has become proper, material, or admissible.

2. Employers Mutual Casualty Company or its attorneys shall be served with all pleadings, notices, or other papers filed in this lawsuit by any of the parties, and this lawsuit shall not be dismissed or discontinued, prior to judgment, without their consent or agreement.

3. In the event that Employers Mutual Casualty Company shall at any time have reasonable cause to believe that this cause is not being properly prosecuted by the named plaintiff, or that its rights and interests are being jeopardized and prejudiced, the insurer may petition for a modification of this order, or for the right to have the control of the prosecution of this action in the name of the plaintiff or in its own name, whichever the Court deems proper, pursuant to the Michigan Workmen's Compensation Act.

4. In the event that the named plaintiff and the Employers Mutual Casualty Company are unable to agree upon a division or the application of the

proceeds of any settlement, or the responsibility for or right to reimbursement for costs of suit, expenses of litigation, or the fees of the attorneys engaged in the prosecution of plaintiff's claim, either the named plaintiff or the Employers Mutual Casualty Company may petition this Court for determination of the apportionment of such proceeds or the responsibility for or right to reimbursement of such costs of the suit, expenses of litigation, or fees of attorneys.

5. In the event that the parties are not able to agree upon the extent of the Employers Mutual Casualty Company's lien upon any judgment recovered by the plaintiff for payments made by Employers Mutual Casualty Company to, or for the benefit of plaintiff under the Workmen's Compensation Act or the Michigan No-Fault Insurance Act, the parties may petition the Court to make a determination as to the extent of Employers Mutual Casualty Company's lien.

/s/ JAMES HARVEY
United States District Judge

APPENDIX B

OPINION ON MOTION FOR ACCELERATED JUDGMENT

(State of Michigan
In the Circuit Court — County of Midland)

(Laura Marie Briggs as Administratrix of the Estate of Robert Lee Briggs, Deceased, Plaintiff, vs. Skyline Corporation, Champion International Corporation, and Homette Corporation, Defendants. File No. 78-008089-NO)

In this case, the court has on previous motions ruled that the Court of Michigan has personal jurisdiction over all three defendants. It also appears that personal jurisdiction may be obtained over the defendants by the courts of Minnesota, and that the statute of limitations in that state would not bar this action. Defendants Skyline Corporation, Champion International Corporation, and Homette Corporation move the court for accelerated judgment of dismissal without prejudice on the ground of *forum non conveniens*.

Considerable discovery has taken place in this matter and certain depositions have been made available to the court. The court concludes that all witnesses having knowledge of the facts and circumstances surrounding the accident itself reside in or near New Ulm, Minnesota. They are not subject to the process of this court. The court concludes from the pleadings heretofore filed that the laws of the State of Minnesota would govern all issues with respect to the liability of the defendants for damages arising out of the death of plaintiff's decedent. It appears that the plaintiff's counsel relies heavily on determinations made by the Minnesota Occupational Safety and Health Administration and the provision of the Minnesota Occupational Safety and Health Act. Michigan's only connection with this incident appears to

be the fact that the decedent was a resident of Midland County, Michigan, at the time of his death, which occurred in Minnesota.

A motion for dismissal in this state, which will require commencing the action in Minnesota, should only be granted if the courts of Minnesota are clearly more capable of fairly resolving the issues in dispute between the parties. Any doubt about this should be resolved in favor of the plaintiff's right to select an appropriate forum having jurisdiction over the parties and the subject matter.

In this case, it is quite clear that there are genuine disputed issues of fact as to the liability of the defendants for the injury and death to plaintiff. Thus the case is distinguishable from the case of *Joe F. Wasche* v *Norbert P. Wasche*, 268 NW2d 721 (Supreme Court of Minnesota). The only witnesses who are claimed to reside within the state of Michigan are the plaintiff and an expert who has been hired to give actuarial testimony. Obviously, both would be available in Minnesota.

Clearly, the selection of a Michigan court as the forum will deprive the finders of fact of the personal attendance at trial of nearly all witnesses whose testimony is material on most of the important issues in the cause. It is possible for the court to dismiss the action in Michigan for re-institution in the State of Minnesota without prejudice to any of plaintiff's legal rights. It appears to the court that the action should be dismissed without prejudice to its re-institution as to all the defendants in the cause. Counsel for the defendant Skyline Corporation may present an appropriate order, approved as to form by counsel for the plaintiff and the remaining defendants.

/s/ DAVID SCOTT DeWITT,
CIRCUIT JUDGE

DATED: January 11, 1980

APPENDIX C

ORDER OF DISMISSAL

(State of Michigan
In the Circuit Court — County of Midland)

(Laura Marie Briggs, as Administratrix of the Estate of Roger Lee Briggs, Deceased, Plaintiff, v. Skyline Corporation, Champion International Corporation, and Homette Corporation, Defendants. File 78-008089-NO-D

At a session of said Court, in the County of Midland, State of Michigan, on the 28th day of January, 1980.

PRESENT: Honorable David Scott DeWitt, Circuit Judge.

THE COURT BEING FULLY ADVISED IN THE PREMISES, and The Court having issued its opinion on Defendant's Motion for Accelerated Judgment,

IT IS HEREBY ORDERED that the Defendant's Motion be and is hereby granted dismissing the Plaintiff's Complaint without prejudice on the ground of *forum non conveniens*.

/s/ DAVID SCOTT DeWITT,
Circuit Judge

COUNTERSIGNED:

/s/ Geraldine J. Banter

Prepared by
H. William Stertz, Jr.
Attorney for Defendants,
Skyline and Hommette
1121 N. Michigan
Saginaw, MI 48602
(517) 751-9595

APPENDIX D

MEMORANDUM OPINION

(State of Michigan Court of Appeals)

(Laura Marie Briggs, Plaintiff-Appellant, v Skyline Corporation, Champion International Corporation, and Homette Corporation, Defendants-Appellees. No. 49818)

BEFORE: M.F. Cavanagh, P.J., and D.E. Holbrook, Jr., and J.H. Piercey, JJ.

Plaintiff appeals as of right from the Midland County circuit court's order of January 29, 1979, dismissing the complaint without prejudice on the ground of *forum non conveniens*.

An examination of the record and briefs discloses no prejudicial error. The lower court's exercise of discretion was in accordance with the law as well-settled in *Cray* v *General Motors Corp*, 389 Mich 382; 207 NW2d 393 (1973).

Affirmed.

APPENDIX E

ORDER

(United States Court of Appeals
for the Sixth Circuit)

(Filed May 13, 1981)

(Homette Corporation, Petitioner v. Honorable James Harvey, United States District Judge, Respondent. No. 81-1167)

BEFORE: Weick, Martin and Jones, Circuit Judges

This matter is before the Court upon petitioner's request for a writ of mandamus directing the district court to vacate its order denying a motion for transfer pursuant to 28 U.S.C. § 1404(a).

The matter of venue was previously litigated in the Michigan state courts, where it was held that Michigan was not the proper forum for this wrongful death action and the case was dismissed. The action was refiled in federal court in the Eastern District of Michigan and petitioner requested it be transferred. Judge Harvey denied the motion and petitioner now challenges this decision.

Although review of an order denying a motion for transfer is proper in a mandamus proceeding, *Skil Corporation v. Miller Falls Co.*, 541 F.2d 554 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976), the Court finds that the prior state court dismissal on the grounds of *forum non conveniens* did not divest Judge Harvey of his discretionary power to rule on the § 1404(a) motion. *Parsons v. Chesapeake & Ohio Railway*, 375 U.S. 71 (1963)

(per curiam). In addition, petitioner has failed to show that the district court abused its discretion in any way. *Lemon v. Druffel*, 253 F.2d 680 (6th Cir. 1958), *cert. denied*, 358 U.S. 821 (1959). Accordingly,

It is ORDERED that the petition for writ of mandamus be, and is hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Opposition

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No. 81-273

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HOMETTE CORPORATION,
Petitioner,

v

HONORABLE JAMES HARVEY
U.S. DISTRICT JUDGE,
Respondent.

LAURA MARIE BRIGGS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LEONARD C. BATTLE (P10542)
200 East Main Street
Midland, Michigan 48640
(517) 631-2000

QUESTION PRESENTED FOR REVIEW

I.

WHERE NO FEDERAL CONSTITUTIONAL QUESTIONS WERE INVOLVED AND WHERE NO FULL AND FAIR ADJUDICATION WAS GIVEN IN A PRIOR STATE COURT PROCEEDING, DOES SUCH A PRIOR STATE COURT DISMISSAL ON THE GROUND OF FORUM NON CONVENIENS SERVE TO DIVEST A FEDERAL DISTRICT JUDGE OF THE DISCRETIONARY POWER VESTED IN HIM ON A MOTION TO TRANSFER UNDER 28 USC 1404 (a)?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

In Court of Appeals:	Homette Corporation Honorable James Harvey
In U.S. District Court:	Laura Marie Briggs, as Administratrix of the Estate of Roger Lee Briggs
	Champion International Corporation Homette Corporation

Parent Corporation of Homette Corporation:
Skyline Corporation, an Indiana Corporation

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TABLE OF AUTHORITIES

Case

Parsons v. Chesapeak & Ohio Railway, 375 U.S. 71; 11 L. ed 2d 137;84 S Ct 185 (1963) 2

Statute

28 USC 1404(a) 1

STATUTE INVOLVED

28 USC 1404 (a):

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

On February 23, 1981, the Honorable James Harvey, District Judge for the Eastern District of Michigan, issued a Memorandum Opinion and Order denying Petitioner Homette Corporation's Motion for Change of Venue. Thereafter, Petitioner filed a Petition for a Writ of Mandamus against the Honorable James Harvey with the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals denied Petitioner's request for mandamus in an order entered May 13, 1981 and from said decision, Homette Corporation filed a petition for a writ of certiorari in the Supreme Court of the United States to review the order of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I.

WHERE NO FEDERAL CONSTITUTIONAL QUESTIONS WERE INVOLVED AND WHERE NO FULL AND FAIR ADJUDICATION WAS GIVEN IN A PRIOR STATE COURT PROCEEDING, DOES SUCH A PRIOR STATE COURT DISMISSAL ON THE GROUND OF FORUM NON CONVENIENS SERVE TO DIVEST A FEDERAL DISTRICT JUDGE OF THE DISCRETIONARY POWER VESTED IN HIM ON A MOTION TO TRANSFER UNDER 28 USC 1404 (a)?

In a per curiam opinion expressing the unanimous view of this Court, it was held in the case entitled Parsons v. Chesapeake & Ohio Railway, 375 U.S. 71 (1963) that a prior state court dismissal on the ground of forum non conveniens can never serve to divest a federal district judge of the discretionary power vested in him on a motion to transfer under 28 USC 1404(a). In its Order filed May 13, 1981 in the instant case, the United States Court of Appeals for the Sixth Circuit, under the principle of stare decises, cited the Parsons case as authority and found that the prior state court dismissal on the grounds of forum non conveniens did not divest Judge Harvey of his discretionary power to rule on the Section 1404 (a) motion. This Court had settled the question in its ruling in Parsons (supra).

The case at bar is a tort case brought under the diversity jurisdiction of the United States District Court. The prior dismissal in the state court was without prejudice and before any full and fair adjudication had been given on the merits of the case. There are, and have been, no federal constitutional questions of any nature involved in this matter.

For the reasons above set forth, this cause should not be reviewed by this Court. See Rule 17 of Rules of the Supreme Court of the United States.

Respectfully submitted,

Dated: December 1, 1981

Leonard C. Battle
200 East Main Street
Midland, Michigan 48640
(517) 631-2000

PROOF OF SERVICE

I, Kerry Allen say that on the 1st day of December, 1981, I mailed a copy of the above Laura Marie Briggs' Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on Honorable James Harvey, District Judge, Federal Building, Bay City, Michigan 48706 and a copy on John Davidson, 1121 North Michigan Avenue, Saginaw, Michigan 48602, by depositing them in a mail receptacle in the City of Midland, Michigan with full postage prepaid.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 1981

Kerry Allen

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No. 81-273

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HOMETTE CORPORATION,
Petitioner,

v

HONORABLE JAMES HARVEY
U.S. DISTRICT JUDGE,
Respondent.

LAURA MARIE BRIGGS' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

LEONARD C. BATTLE (P10542)
Attorney at Law
200 East Main Street
Midland, Michigan 48640
(517) 631-2000

Motion for Leave to Proceed
in Forma Pauperis

NOW COMES Laura Marie Briggs, by Leonard C. Battle, her attorney, and moves the Court for leave to proceed in forma pauperis based on the attached affidavit in support thereof.

Leonard C. Battle
Attorney for Laura Marie Briggs
200 East Main Street
Midland, Michigan 48640
(517) 631-2000

PROOF OF SERVICE

I, Kerry Allen say that on the 25th day of November, 1981, I mailed a copy of the above Laura Marie Briggs' Motion for Leave to Proceed in Forma Pauperis and Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis on Honorable James Harvey, District Judge, Federal Building, Bay City, Michigan 48706 and a copy on John Davidson, 1121 North Michigan Avenue, Saginaw, Michigan 48602, by depositing them in a mail receptacle in the City of Midland, Michigan with full postage prepaid.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on November 25, 1981

Kerry Allen

No. 81-273

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HOMETTE CORPORATION,
Petitioner,

v

HONORABLE JAMES HARVEY
U.S. DISTRICT JUDGE,
Respondent.

LAURA MARIE BRIGGS' AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

LEONARD C. BATTLE (010542)
Attorney at Law
200 East Main Street
Midland, Michigan 48640
(517) 631-2000

No. 81-273

Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis

I, Laura Marie Briggs say that in support of my motion for leave to proceed without being required to file printed pleadings, to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that I am informed and believe that the issues which I desire to present are the following:

> That a prior state court dismissal on the grounds of forum non conveniens can never serve to divest a federal district judge of the discretionary power vested in him on a motion to transfer under 28 USC 1404 (a).

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   Answer: No.

   The date of my last employment was September 1981 and the amount of gross wages per week which I received were Seventy-two ($72.00) Dollars.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   Answer: Yes. I receive Workers' Compensation Survivor's benefits of $264 bi-weekly. I also receive about $800 per month interest from money market certificates.

3. Do you own any cash or checking or savings account?

   Answer: Yes. The total value of the items owned after paying current insurance, car payment and groceries, will be $400.

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Answer: Yes. A description of the property and its approximate value is as follows: A house worth about $30,000; about one acre and one-half which we purchased for $6,600; ten acres of land which cost $3,400; a used trailer worth $6,000; a 1979 Cordoba automobile, and money market certificates worth $70,000.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Answer: Corrina Briggs, my daughter.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on November 25, 1981

Laura Marie Briggs

Laura Marie Briggs